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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NATIONAL ALLIANCE TO END HOMELESSNESS, NATIONAL COALITION FOR THE HOMELESS, CHICAGO COALITION FOR THE HOMELESS AND NATIONAL NETWORK FOR YOUTH AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a loitering ordinance is unconstitutionally vague when it prohibits two or more persons from remaining in a public place with no apparent purpose after a police officer, acting under a reasonable belief that one of the persons is a gang member, asks them to disperse.

2. Whether a loitering ordinance prohibiting two or more persons from remaining in a public place with no apparent purpose, impermissibly punishes involuntary conduct and arbitrarily denies personal liberties of freedom of movement, in violation of substantive due process.

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Pursuant to Rule 37.3 of this Court, *amici curiae* National Law Center on Homelessness & Poverty ("National Law Center"), National Alliance to End Homelessness ("NAEH"), National Coalition for the Homeless ("NCH"), Chicago Coalition for the Homeless ("CCH") and National Network for Youth ("NNY") respectfully submit this brief requesting that the Court affirm the decision of the Supreme Court of Illinois holding that Chicago's anti-gang loitering ordinance, Municipal Code of Chicago § 8-4-015, is unconstitutional.

INTEREST OF AMICI CURIAE[1]

The National Law Center is a not-for-profit organization established in 1989 to address issues relating to homelessness and poverty at the national level. Working with groups across the country, the National Law Center seeks to protect constitutional and other legal rights of poor and homeless people. The National Law Center has extensive experience with federal constitutional issues affecting homeless persons and regularly participates in legislation, public education and litigation, including as *amicus curiae*, to address such issues. These issues arise in many forms including: laws and policies aimed specifically at penalizing homeless people; generally applicable laws discriminatorily enforced against homeless people; and laws not specifically aimed at homeless people that are facially unconstitutional and pose a significant threat to homeless people, as in this case. The National Law Center's purpose here as *Amicus Curiae* is to protect the thousands of involuntarily homeless Chicagoans from the unconstitutional deprivation of their liberties.

The National Alliance to End Homelessness ("NAEH") is a non-profit membership organization working with the public, private and non-profit sectors to solve the problem of homelessness. NAEH's mission is to address the long-term solutions to homelessness. NAEH accomplishes this by working to direct national policy on homelessness and to increase the capacity of local organizations to deliver effective assistance.

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1 This brief is filed with the written consent of all parties. The written consents are on file with the Clerk of the Court. This brief was not authored in whole or in part by counsel for either party and no person or entity, other than the *amici curiae*, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

The National Coalition for the Homeless ("NCH"), organized in 1982, is a non-profit organization and membership network of state and local coalitions committed to the goal of ending homelessness. Toward this end, NCH engages in public education, policy advocacy and grassroots organizing. NCH works to meet the urgent needs and support the civil rights of people who either are homeless or at risk of becoming homeless.

The Chicago Coalition for the Homeless ("CCH") is a not-for-profit corporation located in Chicago, Illinois, which researches the causes of homelessness and advocates for solutions to the problem of homelessness. CCH is comprised of numerous organizations that serve and advocate for the needs of homeless individuals and others concerned about the needs of homeless people. CCH includes a law project which has substantial experience in protecting and advancing the rights of homeless persons in Chicago. Much of its work is targeted on assisting homeless families and their children, as well as older homeless youths. CCH, acting as *amicus curiae* here, shares the goals of protecting the thousands of involuntarily homeless people from unconstitutional police practices at issue in this case.

The National Network for Youth ("NNY"), founded in 1975, is a privately supported membership-based organization, which serves as an advocate for youth, their families and communities. With over 500 direct members and 1,500 constituents involved in its regional and state networks, NNY monitors key legislation and federal spending, engages in public policy debate, educates the public and strengthens the field of youth work. NNY is dedicated to ensuring that young people can be safe and grow up to lead healthy and productive lives.

STATEMENT OF THE CASE

This case is a constitutional challenge to the City of Chicago's anti-gang loitering ordinance, Municipal Code of Chicago § 8-4-015 (the "Ordinance").[2] Section 8-4-015(a) of the Ordinance provides:

> Whenever a police officer observes a person who he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Municipal Code of Chicago § 8-4-015(a). Section 8-4-015(c)(1) defines "loiter" as "to remain in any one place with no apparent purpose."[3] Section 8-4-015(c)(5) defines "public place" to mean "the public way and any other location open to the public, whether publicly or privately owned."[4] Used in conjunction, these two definitions are particularly troublesome for homeless persons, who are often involuntarily in a "public place" "with no apparent purpose."

Simply put, in the context of homelessness, there is often no way to tell whether a myriad of activities have, or do not have, an apparent purpose. Homeless people often have no choice but to "remain" in one place for no apparent purpose. Homeless individuals on the street engage in a wide range of activities, including eating, sleeping, daydreaming,

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2 Munic. Code of Chicago § 8-4-015 (1992).

3 Munic. Code of Chicago § 8-4-015 (c)(1).

4 Munic. Code of Chicago § 8-4-015 (c)(5).

begging, searching for food and reading. During a typical day on the streets, a homeless individual might very well be observed at various times by strangers, including police, to have no apparent purpose. After finishing a meal, a homeless individual who pauses to rest before finding a public bathroom could be considered by some to have no apparent purpose. Homeless persons congregating in a public park, or reading on a park bench, may well be or appear to be purposeless to other persons.

Section 8-4-015(c)(2) of the Ordinance defines "criminal street gang" as an organization "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."[5] A "pattern of criminal gang activity" is defined as "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this Section."[6] Homeless individuals who are involuntarily in a "public place" "with no apparent purpose" generally have no means to determine whether others loitering nearby are members of a "criminal street gang" and, if so, whether they have committed at least two acts of "criminal gang activity" within five years of each other, with at least one such act occurring after June 1992.

Of course, if a homeless individual happens to have a family member who is a gang member, then that homeless individual would have reason to know of certain gang members' identity. This demonstrates the imprecision of the definition of "loitering" and the extreme breadth of the Ordinance. Since virtually all interaction between homeless family members takes place in public places, a police officer observing a homeless mother talking to her homeless

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5 Munic. Code of Chicago § 8-4-015(c)(2).

6 Munic. Code of Chicago § 8-4-015(c)(4).

daughter, a suspected gang member, might regard the two as having no apparent purpose and order dispersal of both. Yet such intimate conversation may have substantial purpose known only to the family members. Even if the conversation has no real purpose, it can only occur on the street because that mother and daughter have no place else to be.

Section 8-4-015(b) of the Ordinance provides that "[i]t shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang."[7] This section surely supplies no relief for those individuals who are living in public in the same general area as a "criminal street gang member." Moreover, it provided no relief to those who received and obeyed one of the approximately 43,000 unconstitutional "move along" orders.[8]

On September 28, 1993, the trial court granted the defendants' motion to dismiss the City of Chicago's action against them under the Ordinance, finding that the Ordinance violated the United States and Illinois Constitutions.[9] The Illinois Appellate Court affirmed, holding that the Ordinance was unconstitutional on the grounds that it was substantially overbroad in violation of the First Amendment, unconstitutionally vague in violation of the Fourteenth Amendment, impermissibly punishes status rather than conduct in violation of the Eighth Amendment, and permits arrest without probable cause to believe that a crime has been or will be committed in violation of the Fourth Amendment. *See City of Chicago v. Youkhana*, 660 N.E.2d 34 (Ill. App. Ct. 1995). The Supreme Court of Illinois unanimously affirmed the lower court's decision on the grounds that the Ordinance was impermissibly vague and a violation of substantive due process rights. *See City of Chicago v. Morales*, 687 N.E.2d 53, 59 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998). It did not reach the other grounds ruled upon by the intermediate appellate court.[10]

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7 Munic. Code of Chicago § 8-4-015(b).

8 Brief of Petitioner at 16.

9 *See City of Chicago v. Youkhana*, 660 N.E.2d 34, 36 (Ill. App. Ct. 1995).

SUMMARY OF THE ARGUMENT

The Supreme Court of Illinois held the Ordinance to be unconstitutional. That ruling should be affirmed. If not affirmed, the vast discretionary power given to the police by this patently unconstitutional Ordinance will pose a threat to the nation's homeless community. Two statistical facts about the homeless population serve to define this threat. First, over 700,000 Americans are homeless.[11] Second, there are not enough shelter beds to house all of the homeless people in America.[12] Thus, many homeless people have no choice but to live in public. The homeless community, therefore, has a particular interest in opposing the City of Chicago's misguided efforts to attack the problem of criminal street gang violence.

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10 *Id.*

11 Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334, 335 (1995).

12 James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. of Orthopsychiatry 320, 323 (1995).

While the problem of gang violence in American cities is serious, methods to combat the problem should be found that do not infringe upon the Constitutional rights of homeless people and others. The challenged Ordinance is facially unconstitutional because it is impermissibly vague and a violation of substantive due process.

First, the Ordinance is impermissibly vague in all its applications and poses a specific threat to homeless individuals. People of ordinary intelligence have no way to know whether they may be regarded by the police as being in a public place with "no apparent purpose" and many homeless people have no way to avoid such a classification. There is likewise no way to determine whether a gang member is nearby and, if so, whether that gang member has been engaged in a "pattern of criminal activity."

The Ordinance also fails to describe adequately what constitutes compliance with a "move along" order, further increasing the likelihood of arbitrary and discriminatory enforcement. The decision whether or not a person has adequately "disperse[d] and remove[d]" oneself is completely at the discretion of the police officer, thus providing a tool for discrimination against unfavored individuals. While this applies to all persons, it is particularly onerous for homeless persons.

In addition to being impermissibly vague, the Ordinance violates substantive due process in that it infringes on the well-established rights of all persons. Those who fail to comply with the "move along" order are arrested--clearly a restraint on their freedom of movement. Those who do comply are coerced into moving along in contravention of their own free will—also a clear restraint on the freedom of movement. Ultimately, they may be forced out of downtown areas containing a concentration of necessary social services,

without recourse for a malicious and erroneous issuance of an order to disperse.

Moreover, the Ordinance unconstitutionally criminalizes involuntary status. The more than 6,000 Chicagoans living in public every day are, in effect, subject to arrest for failing to comply with a "move along" order issued in response to a situation over which they have no control, namely, existing in public. The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment, including criminal liability based solely upon involuntary conduct necessitated by one's status as a member of a group.

The consequences of a "move along" order from the police are especially severe for homeless people. Homeless people often have all their possessions with them and find it difficult to move. They then must face the difficult choice between arrest and abandoning their possessions. Even more fundamentally, for involuntarily homeless people it is impossible to move out of public places, and thus they will inevitably have to repeatedly move, or leave the city altogether, or face arrest. No American should face such choices.

A majority of Chicagoans forced to live in public places inhabit areas of great poverty that are also frequented by criminal street gangs. As most gang-related crimes occur in public,[13] homeless people are inevitably subjected to violence perpetrated by these gangs. While persons who are not forced to live in public can escape to the relative safety of

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13 Richard M. Daley & Terry G. Hilliard, *Gang and Narcotic Related Violent Crime, City of Chicago 1993-1997* (June 19, 1998) (stating that in 1993, 92% of gang-related homicides were committed outdoors, 94% in 1994, 95% in 1995, 93% in 1996, and 93% in 1997) (hereinafter "*Gang and Narcotic Related Violent Crime*").

their homes, homeless individuals cannot. Thus, homeless people have an immediate interest in reducing the incidence of street crimes. An ordinance that unconstitutionally restricts the rights of all citizens and unconstitutionally punishes status, however, is certainly not an appropriate solution to this unfortunate situation.

The decision of the Illinois Supreme Court should be affirmed on the grounds that the challenged Ordinance is impermissibly vague and violates substantive due process.

ARGUMENT

I. INTRODUCTION: THE GROWING PROBLEM OF HOMELESSNESS

For over a decade, homelessness has been a significant and growing problem in America. Recent estimates place the nightly national homeless population at over 700,000.[14] Moreover, given the substantial turnover of the homeless population, some two million people experience homelessness each year.[15] According to a recent Columbia University study, over a five-year period from 1985 to 1990, 8.5 million people, 4.6% of the U.S. population, were

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14 Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334, 335 (1995).

15 Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334, 336 (1995); Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale Law & Policy Review 5 (1996).

homeless at some time.[16] As a result of the increase in the homeless population, the incidence of people living in public places has also grown. Emergency shelters are unable to accommodate all homeless individuals seeking shelter and thus, every night, there are at least as many homeless people living involuntarily in public as there are sheltered.[17] Additionally, shelters are typically closed during the day. Thus, not only are several hundred thousand people forced involuntarily to live in public during the night, but many more than that number are also forced to live in public during the day.

Many more Americans live on the edge of homelessness, teetering precariously between living under a roof or on the streets. In 1995, the shortfall of affordable housing reached record-high levels, with 4.4 million more low-income renters than low-cost units.[18] Also in 1995, 5.3 million Americans who rented housing had incomes below 50% of the local median and paid more than half of their income for rent or lived in severely substandard housing.[19] Inadequate housing conditions force the poorest Americans to use public places such as stoops, parks and streets to

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16 Bruce Link, *Lifetime and Five-Year Prevalence of Homelessness in the United States*, American Journal of Public Health, Vol. 84, No. 12, p. 1909 (Dec. 1994).

17 James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. of Orthopsychiatry 320, 323 (1995).

18 Jennifer Daskal, Center in Budget and Policy Priorities, *In Search of Shelter: The Growing Shortage of Affordable Rental Housing*, p. 9 (June 15, 1998) (hereinafter "*In Search of Shelter*").

19 U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Rental Housing Assistance—The Crisis Continues: The 1997 Report to Congress on Worst Case Housing Needs*, p. 9 (Apr. 1998).

conduct ordinary human activities, such as relaxing and socializing, to a much greater extent than those with adequate housing. With small, overcrowded rooms, and without air conditioning on hot summer days, inadequately housed Americans share many challenges in common with homeless people. In many cases, the Ordinance will affect the two groups alike.

The City of Chicago alone had a 1995 affordable housing gap of 130,000 units.[20] Chicago currently has a homeless population of over 9,000 with a combined total of only 5,180 emergency shelter beds and transitional housing slots.[21] Therefore, almost 4,000 homeless individuals are forced involuntarily to live in public during the night, with an even greater number living in public during the day when many of the shelters are closed.[22] These individuals inhabit areas of Chicago plagued by gang activity, as street gangs exist in nearly every community in Chicago, with total gang membership estimated at 125,000.[23] Consequently, on a daily basis, there are thousands of homeless Chicagoans who will be found in proximity with gang members in a public place with "no apparent purpose." *See* Municipal Code of

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20 *In Search of Shelter*, *supra* n. 19 at 50.

21 *See* National Law Center on Homelessness & Poverty, *Access Delayed, Access Denied: Local Opposition to Housing and Services for Homeless People Across the United States* (Dec. 1997); *see also* Chicago Coalition for the Homeless, *Homelessness: The Causes and Facts*, p. 1 (1996) (placing the homeless population on any given day at as many as 15,000); *see also* Chicago Department of Human Services, *Homlessness Services Programs, Annual Report*, p. 10, 45 (1997) (placing number of shelter beds at approximately 4,000).

22 U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *A Report to the Secretary on the Homeless and Emergency Shelters*, p. 38 (1988).

23 *Gang and Narcotic Related Violent Crime* at Introduction.

Chicago § 8-4-015(c)(1) (defining the term "loiter"). Moreover, homeless people often live in areas of poverty where a large number of necessary social services are located. Because gangs tend to inhabit these same areas, homeless people often will be in a "public place" "with no apparent purpose" in the same area as gang members.

II. THE ORDINANCE IS IMPERMISSIBLY VAGUE IN VIOLATION OF DUE PROCESS GUARANTEES

A criminal statute is unconstitutionally void for vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[24] Stated another way, "the void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[25] The Ordinance here is impermissibly vague because its prohibitions are so obscure "that persons potentially subject to [the law] cannot know with fair assurance how to act in order to avoid liabiiity."[26] The Ordinance is also overbroad in that it sweeps in clearly

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24 *United States v. Harriss*, 347 U.S. 612, 617 (1954).

25 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

26 Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, Criminal Law Bulletin, vol. 3., no. 4, at 205, 217 (1967); *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

protected activity along with the illicit. Finally, the breadth and obscurity of critical definitions in the Ordinance offend due process in that they permit arbitrary and discriminatory arrests and convictions. The Supreme Court of Illinois correctly found that the Ordinance violates due process in that it is both "impermissibly vague on its face and an arbitrary restriction on personal liberties."[27]

A. The Ordinance is not sufficiently definite to give persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct.

It is well-established that a law or ordinance that is insufficiently definite will be void for vagueness.[28] The Chicago anti-gang loitering ordinance defines "loitering" as "remain[ing] in one place with no apparent purpose."[29] This definition fails to draw any objective distinction between innocent conduct and conduct likely to cause harm. As a result, the definition of "loitering" in the Ordinance does not sufficiently inform ordinary citizens of what conduct constitutes the act of loitering. Thus, the Ordinance is void for vagueness.

The Ordinance fails to give a person of ordinary intelligence adequate notice of the prohibited conduct. In

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27 *City of Chicago v. Morales*, 687 N.E.2d 53, 59 (Ill. 1997).

28 *Posters 'N' Things v. United States*, 511 U.S. 513, 525 (1994), *citing Kolender*, 461 U.S. at 357.

29 Munic. Code of Chicago § 8-4-015(c)(1).

common, every-day usage, the term "loitering" encompasses a broad range of meanings. If one is standing on a street corner smoking a cigarette, or sitting on a park bench, is he "loitering"? If he is eating, sleeping, daydreaming, panhandling, reading in public, is he in jeopardy under the Ordinance? Obviously, neither the Ordinance nor common sense provides an answer. Making matters worse, individuals who are not gang members are unlikely to realize when they are in proximity to a gang member or to someone who a police officer reasonably believes to be a member of a criminal street gang. This compounds the difficulty of ascertaining whether one's conduct is likely to be viewed as illegal.

By requiring a dispersal order based simply on a police officer's determination that a person present in a public place appears to have no purpose, the Ordinance builds in a highly imprecise and subjective standard. Indeed, one might imagine a variety of simple everyday scenarios in which a homeless individual going about his or her daily business might be thought, wrongly or rightly, to have no apparent purpose. With or without an apparent purpose, a homeless person is entitled to go about his or her ordinary business without threat of prosecution under the Ordinance. Further, and perhaps more fundamentally, conditioning the dispersal order on a determination of purpose, the Ordinance necessarily penalizes those who have no choice but to be in public places—and does so simply for that reason.

This Court's ruling in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), is precisely on point--the Ordinance's overbroad language sweeps in conduct that the legislature never intended to proscribe. In *Shuttlesworth*, this Court overturned a conviction under a Birmingham, Alabama city ordinance that made it unlawful for any person or any number of persons to "so stand, loiter or walk upon any street or sidewalk [in the city] as to obstruct free passage over, on

or along said street or sidewalk." *Id.* at 90. The ordinance, like that at issue here, also made it unlawful to stand or loiter on a city street or sidewalk after having been requested to move along by a police officer. *Id.* "The constitutional vice of so broad a provision," said the Court, "needs no demonstration." *Id.* at 90-1.

The Chicago anti-gang loitering Ordinance, as the Supreme Court of Illinois correctly held, is likewise overly broad. The problem of overbreadth is particularly troublesome to homeless persons. When a person is living in public, all of the daily activities are in public view. When in the vicinity of a gang member, that individual would be susceptible to a dispersal order or arrest under the Ordinance. Anyone who has ever walked down a busy street in a major U.S. city has seen homeless people engaged in the activities of their daily lives. Activities such as eating or waiting for a bus may have a readily apparent purpose. In contrast, for the typical passerby, a homeless individual sitting in an alley, or a doorway, or lying on a blanket or a cardboard box, may be considered not to have an apparent purpose.

It should come as no surprise that homeless people may in fact not have an apparent purpose to all their activities. Indeed, at times, almost all people lack a purpose to their activities, apparent or otherwise. However, most people have some place private to be when they have no apparent purpose. When relaxing, daydreaming, pausing to take a deep breath, gazing up into the sky, or engaging in any other activity which may have no outwardly (or inwardly) apparent purpose, most people have the option to do so in private, out of sight of others. For homeless people, there is no such luxury. Homeless people must perform all such activities in public.

For a person living on the streets, the burdens imposed by the Ordinance are unacceptable. It is difficult, if

not impossible, to determine when a homeless person is "remaining in one place with no apparent purpose." They do not have the luxury of being elsewhere. Therefore, whatever their purpose is, they will be on the streets and at risk of being chased out of the neighborhood by a police officer enforcing the Ordinance.

In addition, homeless persons are more likely than the average person to be found in areas characterized by high crime rates and gang activity. Thus, as a group, homeless people are particularly likely to be observed by a police officer with a member of a criminal street gang.

The City of Chicago argues that the Ordinance is saved by the requirement of a police order to disperse, prior to arrest. However, as was the case in *Shuttlesworth*, this argument lacks merit. While the order to disperse certainly gives individuals an opportunity to leave the scene, one's failure to do so will result in an arrest without any idea of the nature of the criminal act that has been committed. The dispersal order does nothing to inform the subject "what the State commands or forbids" and so it does not cure the constitutional infirmity of vagueness.[30]

B. The Ordinance permits arbitrary and discriminatory enforcement by police.

While the underlying rationale of the void-for-vagueness doctrine requires that a statute be definite enough to serve as a guide to an individual's conduct, a more important aspect of the doctrine "'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law

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30 *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

enforcement.'"[31] Without such guidelines, the Ordinance unconstitutionally permits a "standardless sweep [that] allows policeman, prosecutors, and juries to pursue their personal predilections."[32]

As this Court observed in *Shuttlesworth v. City of Birmingham*, 382 U.S. at 90-1, an overbroad law is unconstitutional because it "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." [Citation omitted]. *Id.* at 90-1. The Court suggested a literal application of the Birmingham ordinance that is directly relevant here: "that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." *Id.* at 90. As the Court noted, "that kind of law bears the hallmark of a police state." *Id.* at 91.

Similarly, in *Kolender v. Lawson*, the Court found a California loitering statute to be unconstitutionally vague because it "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Kolender*, 461 U.S. at 358.

Just as in *Kolender*, the Ordinance here gives police too much authority and unfettered discretion, creating the "potential for arbitrarily suppressing First Amendment liberties...." *Kolender*, 461 U.S. at 358, *quoting Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965). Because the Ordinance fails to establish clear minimal guidelines to govern the Ordinance's enforcement, the Ordinance leaves police officers to enforce the Ordinance

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31 *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), *quoting Smith v. Goguen*, 415 U.S. 566, 574 (1974).

32 *Id.*, *quoting* 415 U.S. at 575.

according to their own personal conceptions of what constitutes "remain[ing] in one place with no apparent purpose."

An example illustrates the dangers of this Ordinance: an individual sits on a park bench, near a suspected gang member (to the eye of a police officer). The police officer believes that the individual is doing nothing. In the case of a homeless person, however, the person doing "nothing" may be holding an empty paper cup used for panhandling. The Ordinance leaves it to the whim of the police officer to try to make the fine distinction between truly "doing nothing" and waiting for a passing stranger to throw a quarter in the paper cup. This example also highlights the absurdity, as well as the constitutional infirmity, of making "doing nothing" a criminal act. Furthermore, allowing a police officer to decide whether to ask this individual to move on clearly vests that officer with the unconstitutional discretion to punish innocent conduct. And, giving police officers such unfettered discretion leaves the courts with the task that is properly left to the Legislature—determining the limits of the law's application.

The existence of such discretion has been held by this Court as a reason to declare a law unconstitutionally vague and overbroad. In *United States v. Reese*, this Court said that:

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.

United States v. Reese, 92 U.S. 214, 221 (1876); see *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165

(1972) ("[h]ere the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police"). The Chicago Ordinance is indeed dangerous to many innocent citizens whose only "crime" is that they have no place to go but the streets.

Other circumstances combine to heighten the risk of arbitrary application of the Ordinance to the homeless community. First, approximately 25% of the homeless population consists of children.[33] Criminal street gangs in Chicago are composed of a high percentage of teenage children.[34] Because a significant portion of both the homeless population and the gang population are teenage children, there is a likelihood for confusion between the two groups.

Second, homeless individuals often congregate for purposes of receiving social services, such as meals and healthcare. Seeking safety in numbers, they also frequently congregate at night. Their tendency to congregate in groups increases the chance that a police officer will apply the Ordinance to homeless individuals.

Third, since homeless people often have all of their possessions with them or nearby, they may be particularly reluctant to move on, making arrest far more likely than for those who are more mobile. Also, homeless persons may move along, only to be ordered later to disperse again.

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33 Paul Leavitt, *Food-Shelter Requests On The Rise, Mayors Say*, USA Today, Dec. 20, 1995, at 3A.

34 In 1997, 21% of offenders arrested for gang related homicides were younger than age 17, and 69% were younger than age 21. *Gang and Narcotic Related Violent Crime* at 2.

The Ordinance also has a harmful chilling effect on humanitarian efforts designed to help homeless persons. Dispersal orders and arrests for disobeying such orders are likely to affect volunteers and workers in the business of providing services to homeless persons. For example, certain individuals and organizations provide essential social services to homeless persons, including medical and psychiatric treatment. Others are involved in valuable outreach programs, designed to reconnect homeless people with the world around them. Still others seek to engage the homeless for religious purposes or for voter registration. Providers of such services, which benefit society in general by fighting to end the despair of homeless persons, are placed at risk by the Ordinance and their services may be diminished. Ultimately, the chilling effect created by the Ordinance takes it greatest toll on the homeless themselves, who lose the vital services on which they depend.

The unique circumstances of homeless individuals and their non-profit support network serve to highlight the constitutional vagueness of the Ordinance, which both fails to distinguish between permissible and impermissible conduct, and also permits arbitrary and discriminatory enforcement by police.

III. THE ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS GUARANTEES

The Ordinance is also constitutionally inadequate because it violates due process guarantees. First, because they have no place else to be but on the streets, homeless persons face criminal penalties under the Ordinance for their

involuntary condition of homelessness. Such a penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment and the Due Process clause. Second, the Ordinance abridges the freedom of movement.

A. The Ordinance impermissibly punishes involuntary conduct.

Chicago's anti-gang loitering ordinance unconstitutionally criminalizes status by permitting arrest and conviction in the absence of any criminal conduct. The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such."[35] The loitering statute inflicts a "cruel and unusual punishment" in violation of the Eighth Amendment, made applicable to the States by the Due Process Clause of the Fourteenth Amendment.

For many homeless Americans, living on the streets is an unfortunate and unavoidable way of life. Stated in the simplest of terms, they have no place else to be. To criminally sanction homeless individuals for "remain[ing] in one place with no apparent purpose" is to punish those individuals for existing. Homeless people are on the streets

35 *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16 (1979) (applying Eighth Amendment standards through the Due Process Clause to pretrial detainees); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *see* U.S. Const. amend. VIII. Challenges to police action under the element of the Eighth Amendment that imposes "substantive limits on what can be made criminal" do not require conviction or punishment as a precondition to constitutional review. *See Wheeler v. Goodman*, 306 F. Supp. 58, 60 (W.D.N.C. 1969) (holding vagrancy law violative of Eighth Amendment although complaining parties were not convicted), *vacated on other grounds*, 401 U.S. 987 (1971); *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.) (Court considered Eighth Amendment argument in motion to dismiss indictment prior to conviction, rejected on other grounds), *cert. denied*, 414 U.S. 980 (1973).

precisely because they have nowhere else to be. With a growing homeless population and a shortage in temporary housing, homeless people are increasingly forced to perform daily essential living functions on the street and in public spaces. In Chicago alone, over 6,000 homeless individuals are forced to live in public during the day, with as many as 4,000 sleeping on the streets at night.[36]

Two cases in this Court define the contours of this area of Constitutional protection. First, in *Robinson v. California*, 370 U.S. 660, 666-67 (1962), the Court compared a statute that criminalized "being addicted to narcotics" with a criminal ban on mental illness or leprosy. *Id.* at 667 n. 8. Because the violation was based on the arrestee's status as a narcotics addict, the Court struck down the law as a violation of the Eighth Amendment.

Subsequently, in *Powell v. Texas*, 392 U.S. 514, 533 (1968), the Court distinguished the punishment of acts necessitated by one's status (the result of "irresistible compulsion") from those acts claimed merely to be linked to a person's status. Powell had been convicted of public drunkenness, and alleged that the law in fact criminalized his status as a chronic alcoholic. A plurality of the Court held that Powell failed to establish as a matter of fact that his status as a chronic alcoholic necessitated that he be drunk *in public* and thus concluded that the Eighth Amendment had not been violated. In a concurring opinion, Justice White noted that, for certain persons, being in public may not be voluntary:

> Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these

36 *See supra* note 21.

> unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk.

Powell, 392 U.S. at 551 (White, J., concurring).

What Justice White raised as a hypothetical in *Powell* is squarely at issue here. Even more clearly than a law penalizing a chronic alcoholic for the act of getting drunk, or a gang member for merely sitting with friends in public, a statute that penalizes a person for simply occupying the only space he or she is able to occupy must be cruel and unusual. No act of will can overcome a person's ongoing need to be somewhere--to take up space as long as he exists.

Whether engaged in some life-sustaining act such as eating or sleeping, or simply being on the street with no apparent purpose, homeless people have to be somewhere. For homeless individuals and families, living in public is an unavoidable and involuntary way of life. Homeless people in Chicago and the nation's other urban centers have no other place to be but in public.[37] To impose criminal penalties on

[37] The plurality in *Powell* rejected the claim that the punishment of acts committed under a "strong compulsion" arising from one's status violated the Eighth Amendment. For instance, a drug addict may be "strongly compelled" to steal to support his addiction, but the robbery may be punished without violating the Eighth Amendment. *Amici curiae* here does not argue otherwise. Rather, we argue that for involuntarily homeless persons, remaining in a public place--when there is no other place to be--is the result of necessity or an "irresistible compulsion" and this cannot be punished consistent with *Powell* and the Eighth Amendment. *See Pottinger v. City of Miami*, 810 F. Supp. at 1551 (S.D.Fla. 1992); *Powell*, 392 U.S. at 535.

homeless individuals for being on the streets without apparent purpose, criminalizes involuntary conduct that is impossible for homeless persons to avoid. In effect, as applied to homeless persons, this Ordinance criminalizes their very existence. This is cruel and unusual treatment in violation of the Eighth Amendment.

B. The Ordinance abridges the liberty interest in freedom of movement under the Due Process Clause.

In *Kolender*, the Court stated that arresting people for loitering or wandering in public without proper identification "implicates consideration of the constitutional right to freedom of movement." *Kolender*, 461 U.S. at 358, *citing Kent v. Dulles*, 357 U.S. 116, 126 (1958). Subjecting any American, homeless or otherwise, to arrest and criminal prosecution for moving about in public places or staying in one public place also offends basic principles of liberty protected by the Due Process Clause. Professor Charles A. Reich said:

> I know of no law that requires me to have either a purpose or a destination. If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and

> Mirach without finding myself staring into the blinding light of a police flashlight.

Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 Yale L. J. 1161, 1172 (1966). Professor Reich's comments embody a belief that all Americans enjoy a liberty interest in wandering about aimlessly with no apparent purpose, in loafing, in wandering freely, or standing still freely, all activities that this Court describes as "historically part of the amenities of life as we have known them." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

This Court has found that "arresting individuals for loitering or wandering on public streets without identification 'implicates consideration of the constitutional right to freedom of movement."[38]

In addition to judicial sources, the liberty interest in freedom of movement is well documented as part of a longstanding American literary tradition.[39] Furthermore, its importance has increased with the growth of large urban residential communities and the simultaneous shrinking in the amount of personal space for the residents of those communities. These residents include homeless people, for whom personal space has merged with public space. The Ordinance infringes on the liberty of movement enjoyed by all Americans under the Due Process Clause of the Fifth Amendment.

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38 *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579 (S.D. Fla. 1992), *quoting Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

39 *See Papachristou*, 405 U.S. at 164 and n. 7.

CONCLUSION

For the reasons stated above, the City of Chicago's anti-gang loitering Ordinance is unconstitutionally vague, punishes involuntary conduct and unconstitutionally restricts the freedom of movement, in violation of substantive due process. The judgment of the Supreme Court of Illinois should be affirmed.

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